IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 102/2006

Shri Dharmaji Vithal Desai
son of late Vithal Dessai, 59 years old
married, Indian National, resident of
Bankhleawado, Morod, Cuncolim,
Salcete, Goa. ..... Petitioner.

V/s.

Cuncolim Municipal Council
a Municipal Council Constituted and
incorporated under Goa Municipalities
Act, 1968, having office at
Cuncolim Municipality Building,
Cuncolim, Salcete, Goa. ..... Respondent.

Mr. Shivan Dessai, and Mr. S. Kalshavkar, Advocates for the petitioner.

Mr. P. A. Kholkar, Advocate for the respondent.

CORAM : A.P. LAVANDE, J.

Date of reserving the Order :
23/03/2006.

Date of pronouncing the Order:
31/03/2006

O R D E R :

By this writ petition, the petitioner takes exception to Order dated 27th February, 2006, passed by the IIIrd Additional Civil

Judge, Civil Judge, Senior Division, at Margao in Regular Civil Suit No.209/2005/III, in so far as it directs the petitioner to deposit the balance amount of two installments of the paid amount, amounting to Rs.2,99,000/- within 15 days. The petitioner is the plaintiff and the respondent is the defendant in the said suit.

2. On 17.3.2005, the respondent held auction in respect of collection of fees (sopo) in which the petitioner offered a sum of Rs.5,98,000/-. Since the petitioner was the highest bidder, by order dated 29.3.2005, the right to collect fees for the period from 1.4.05 to 31.3.06 was awarded in favour of the petitioner. According to the petitioner, some of the vendors who were liable to pay fees were not allowed by the respondent to sit in the open space which was earmarked for them and as such, the petitioner suffered heavy loss. On 13.9.05, the petitioner filed the above suit praying for a decree against the respondent in the sum of Rs.51,000/- with interest and for a permanent injunction restraining the defendant from conducting fresh auction for the period from 1.5.05 to 31.3.06 in respect of collection of fees. Along with the said suit, an application for temporary injunction seeking similar relief against the respondent was also filed. On 17.9.05, the trial Court passed an order of status quo. The respondent filed written statement as well as reply to the application for temporary injunction. During the course of the said application for interim relief, the respondent filed an application

seeking necessary orders directing the petitioner to deposit the balance amount of Rs.2,99,00/- in the trial Court as, according to the respondent, out of the said amount of Rs.5,98,000/- the balance amount of Rs.2,99,000/- was to be paid by the petitioner. The petitioner opposed the said application on several grounds. The trial Court, after hearing both sides, by common order dated 27.2.2006, dismissed the application for temporary injunction filed by the petitioner and allowed the application filed by the respondent, directing the petitioner to deposit the balance amount of Rs.2,99,000/- within a period of 15 days. It is this direction of the trial Court which is challenged by filing the present petition.

3. Mr. Dessai, learned Counsel appearing for the petitioner submitted that the trial Court having dismissed the application for temporary injunction, had no jurisdiction to direct the petitioner to deposit the said amount, more particularly in the absence of any counter claim by the respondent. The learned Counsel further submitted that the trial Court committed a gross jurisdictional error by directing the petitioner to deposit the said amount in the trial Court inasmuch as in a suit filed by the petitioner, he could not have been directed to deposit the amount in the absence of any counter claim by the respondent. He further submitted that the order, in so far as it directs the petitioner to deposit the balance amount, is patently without jurisdiction and, therefore, the same requires to be quashed

and set side.

4. Per contra, Mr. Kholkar, learned Counsel appearing for the respondent submitted that the trial Court was absolutely justified in passing the impugned order directing the petitioner to deposit the said amount which was admittedly due to the respondent. The learned Counsel invited my attention to the para 30 of the plaint in which the petitioner has stated that he is entitled to recover the amount of Rs.51,000/- after allowing set off of Rs.2,99,000/- being the balance amount. The learned Counsel further invited my attention to the fact that notwithstanding the dismissal of the application for temporary injunction, the petitioner continues, till date, to collect the fees and the respondent would have no objection if he collects the fees till 31.3.2006. The learned Counsel submitted that the trial Court was justified in directing the petitioner to deposit the amount under Order 39, Rule 10 or Section 151 of the Code of Civil Procedure. In support of his submission, he relied upon the Judgment of our High Court in **Jay Container Services Co. Pvt. Ltd. vs. S.D.S. Shipping Pvt. Ltd. & ors.,** 2003(1) ALL MR 541.

5. In reply to the submissions made by Mr. Kholkar, Mr. Dessai invited my attention to para 31 of the plaint in which, the petitioner, inter alia, has stated that the defendant (respondent) has no right to claim balance amount of Rs.2,99,000/- from the plaintiff

(petitioner).

6. I have considered the submissions made by the learned Counsel for both sides. Admittedly, the petitioner has been collecting the fees from 1.4.05 till date. Mr. Kholkar, on behalf of the respondent has also submitted that the respondent will have no objection if the petitioner collects the fees till 31.3.06. I find considerable merit in the submission of Mr. Kholkar that the petitioner has admitted in para 30 of the plaint the liability in the sum of Rs.2,99,000/- being the balance bid amount. The statement made by the plaintiff is a statement of fact which has been verified as true to the knowledge of the petitioner. The averment made by the petitioner in para 31 of the plaint that the defendant has no right to claim balance amount of Rs.2,99,000/- is a legal submission, as is evident from the verification clause of the plaint. Therefore, considering the factual position, as well as the averments made in the plaint, it is difficult to accept the submission made by Mr. Dessai that the trial Court had no jurisdiction to direct the petitioner to deposit the said amount in the trial Court. It is to be noted that the petitioner was protected by virtue of a status quo order passed on 17.9.2005 and has collected the fees. Therefore, in my opinion, the trial Court was justified in directing the petitioner to deposit the said amount under Order 39, Rule 10 of C.P.C. Even if the argument of Mr. Dessai that Order 39, Rule 10 of C.P.C. is not attracted in the present case is

accepted, still the trial Court was justified in directing the petitioner to deposit the said amount in terms of Section 151 of C.P.C. It is to be noted that the trial Court has only directed the petitioner to deposit the amount which he is liable to pay being the successful bidder in respect of the collection of fees. Therefore, I do not find any legal infirmity or jurisdictional error in the order which is impugned by the petitioner.

7. In the result, therefore, I do not find any merit in the petition, and as such the same is liable to be rejected. This Court vide order dated 14.3.06 has stayed the impugned order in so far as it directs the petitioner to deposit the amount of Rs.2,99,000/- which was to expire on that day. In view of the said order dated 14.3.2006 and in the interest of justice, the time to deposit the amount of Rs.2,99,000/- is extended till 7th April, 2006.

8. In view of the above, the petition stands dismissed, subject to the observations made herein above, with no order as to costs.

A.P. LAVANDE, J.

ssm.